S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

COFFEE BEANERY, LTD., Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED May 16, 2006
v WILLIAM ALBERT, MICHAEL YURICK, and HARTLAND COFFEE BEANERY, LLC, d/b/a COFFEE BEANERY, Defendants/Counter-Plaintiffs/ Third-Party Plaintiffs/Third-Party Defendants-Appellants, and KEVIN SHAW, Third-Party Plaintiff/Third Defendant.	No. 259022 Livingston Circuit Court LC No. 02-018999-CK

Before: Murphy, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's grant of summary disposition on plaintiff's claims for unpaid franchise royalties, its denial of defendants' claims for rescission and damages, and its imposition of case evaluation sanctions against defendants. We affirm.

Taking the facts in the light most favorable to defendants, this case arose when defendants' partner, Kevin Shaw, enticed the individual defendants to join him in a franchised coffeehouse venture. Defendant Yurick was developing the site of the new coffeehouse when Shaw approached him and explained that the coffeehouse would not be able to lease the space because an investor withdrew, unless Yurick would like to replace the withdrawn investor. Shaw asserted that he had a longstanding business relationship with plaintiff, the franchisor. He also explained that his parents were high-ranking executives in plaintiff's corporation, that he personally worked for plaintiff as Vice President of Franchise Sales, and that he successfully ran a franchise through plaintiff. On the basis of business pro formas (which projected sales, income, labor costs, and other statistics for a new franchise), defendant Yurick decided that the investment was a better alternative than losing rent, and even encouraged his friend, defendant Albert, to join the partnership. At Shaw's suggestion, Yurick presented a check for $25,000 in franchise fees.

Shortly afterward, the three men signed a partnership agreement and registered defendant Hartland with the state. One month after that, Shaw presented a franchise agreement in the parking lot of the construction site that would become the franchised coffeehouse. Shaw explained that it was a franchise agreement that required all their signatures, but otherwise indicated that their signatures were a formality. He encouraged them to backdate a document indicating that they received various disclosure documents. He provided the disclosure documents, but then retained all the signed documents for presentation to plaintiff. He promised to provide copies the next day, but did not.

The business did not go as portrayed. Shaw did not fulfill his promise to obtain independent financing, so Yurick extended Hartland a loan through his development company. Five months after the individual defendants signed the franchise agreement, and a week before the coffeehouse opened, Yurick finally received copies of the documents he signed. He expressed dissatisfaction with several of the contract's terms, but continued to work toward a successful grand opening. Shaw did not train the staff or manage the coffeehouse's opening as defendants expected, taking vacations and leaving the individual defendants and their spouses to fend for themselves. Shaw also gave the manager a vacation on the weekend of the opening, and did not adequately cover her responsibilities as promised. Within a week, allegations of Shaw's sexually harassing behavior towards a coffeehouse employee surfaced, and defendants bought him out of the partnership.

Although several issues of compliance arose and expectations were dashed, the parties attempted, at first, to resolve their difficulties and move forward. However, plaintiff and Shaw simultaneously pressed for payment on several pieces of equipment that Shaw said he had already personally paid for and delivered, but for which defendants never paid. At this point, defendants began asserting that the entire contract was void, and they withheld payment on the equipment until they received evidence of the amounts owed and to whom they were owed. Plaintiff brought suit for payment and a declaration that the contract was valid and enforceable. Defendants answered with counter-claims and cross-allegations of fraud. Shaw briefly entered the suit, but he asserted an arbitration clause and was dismissed. Plaintiff eventually dropped its claim for equipment, but added a claim for royalties when defendants stopped paying them. The trial court essentially rejected defendants' assertions of fraud and statutory violations, and it held that defendants were liable for royalties under the contract.

On appeal, defendants argue that they created a genuine issue of material fact regarding the contract's validity, so the trial court erred in granting plaintiff summary disposition on their counterclaims. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Defendants rely primarily[1] on the Michigan Franchise Investment Law (MFIL), MCL 445.1501 *et seq*., for their claims of rescission and damages. Under the MFIL, a franchisor must make certain mandatory disclosures at least ten days before receiving any money from or entering a contract with a prospective franchisor. MCL 445.1508. It also contains a provision that forbids persons from making material misrepresentations or employing deceptive practices to sell a franchise. Although defendants provided evidence that plaintiff technically violated the MFIL, a violation of the MFIL does not render the contract void and unenforceable. *Maids Int'l v Saunders*, *Inc*, 224 Mich App 508, 512; 569 NW2d 857 (1997). On the contrary, the MFIL only expressly permits two types of remedies for a violation, damages and rescission. MCL 445.1531. Defendants failed to tender back the benefits of the contract (the signs, trademarks, equipment, location, proceeds), so rescission is not available to them as a remedy. *Two Men & A Truck/Int'l*, *Inc v Two Men & A Truck/Kalamazoo*, *Inc*, 949 F Supp 500, 506-507 (WD Mich, 1996), cited with approval in *Maids Int'l, supra*. Nevertheless, our Supreme Court has traditionally found that a defrauded individual may continue under the contract and claim damages for the difference between the contract actually entered and the contract as represented. See e.g. *Elson v Harris,* 356 Mich 175, 178-180; 96 NW2d 767 (1959), and cases cited therein. The difference in this case, however, is that defendants have continued with the contract and have failed to tie any damages to a legally recognizable MFIL violation.

Defendants fail to point to any information contained in the disclosure documents that, because of their untimely presentation, caused them damage.[2] Although defendants point to several unsavory and unanticipated contract provisions, defendants have failed to demonstrate that plaintiff has ever sought to enforce any of them. The only contractual elements to which defendants objected after Shaw returned all the signed documentation were those related to franchise renewal, management review, and a non-compete clause. Without evidence that plaintiff has sought to enforce these provisions, however, damages are wanting. Although defendants argue that the late disclosure prevented them from paying a reduced franchise fee, this assertion is not supported by the record. Defendants were told that the franchise fee would be $25,000 before they entered the contract, and the contract reflects that amount. Moreover, defendant failed to contradict Shaw's affidavit in which he explained that the reduced $5,000 fee was not applicable because defendants did not sign an exclusive area development agreement.

---

[1] Although the individual defendants also cursorily refer to common-law fraud, their deposition testimony indicates that they knew they were signing a largely unread franchise agreement, and the franchise agreement contains a clear integration clause. Therefore, defendants' blind reliance on Shaw's pre-contractual promises and assertions, even if attributable to plaintiff, was unreasonable and insufficient to sustain a claim for common-law fraud. *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994); *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690; 599 NW2d 546 (1999); *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 504-507; 579 NW2d 411 (1998).

[2] Yurick repeatedly claims that he would not have entered the contract if he had understood its terms or followed plaintiff's correct procedure, but if Yurick wanted to avoid the contract he should have rescinded. Having accepted the contract, his measure of damages is not whatever he has lost, but the difference between the contract he thought he was entering and the contract he entered. *Elson*, *supra*.

Notably, defendants assert that the reduced fee was appropriate because Shaw was a partner with defendants, but they do not explain how this benefit is still applicable now that Shaw has been bought out. Under the circumstances, defendants failed to provide any evidence that the franchise fee would have been lower if plaintiff had followed the appropriate disclosure procedures.

Defendants reiterate many of these same issues in their claims for fraud damages under MCL 445.1505. However, rescission does not apply to these claims either, and defendants again fail to state a cognizable claim for money damages. For example, defendants fail to indicate any damage from Shaw's and plaintiff's alleged misrepresentation of equipment costs, because Yurick admitted that defendants failed to pay anyone for the disputed equipment that the coffeehouse nevertheless continued to use. Similarly, Shaw's alleged misrepresentations regarding the amount of leeway defendants had in choosing décor are undermined by Yurick's admission that defendants generally failed to conform to plaintiff's mandates and actually devoted a relatively small portion of their business to franchise operations. Defendants never presented evidence of costs incurred for redoing decorative arrangements Shaw had approved. Likewise, assuming arguendo that Shaw's inability to obtain financing as promised constituted a fraudulent or deceitful practice, defendants eventually obtained financing through Yurick's development company and fail to demonstrate how their liabilities would be less if they had obtained franchising as promised.

Defendants argue that Shaw's misrepresentation of management responsibilities and labor costs caused them damage. Regarding management, however, defendants failed to provide any evidence that Shaw never intended to manage the coffeehouse. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 444; 505 NW2d 275 (1993). Shaw assumed that role, however ineffectively, until defendants unexpectedly relieved him from the responsibility within a week after the grand opening. Under the circumstances, defendants fail to attribute any damages incurred in replacing Shaw with an "untrue statement of material fact" regarding Shaw's management of the coffeehouse. *Id*.; MCL 445.1505(b). Finally, Yurick's claimed damages regarding labor costs do not comport with Yurick's testimony regarding his reliance on the pro formas. Yurick testified that Shaw told him he could expect labor costs of 14 percent but they were actually "closer to 40 percent." Yurick admits, however, that he relied more significantly on the pro formas presented by Shaw, one[3] of which suggested he could anticipate a 28.5 percent labor cost. This percentage comports with a schedule that plaintiff's representative provided to defendants after the coffeehouse opened that, if properly used, would theoretically have moved defendants toward a goal of 30 percent labor cost. Yurick never demonstrated that the pro forma materially misrepresented the amount of labor expense he could anticipate or that plaintiff's proposed schedule was a sham. Under the circumstances, defendants failed to demonstrate that plaintiff employed a deceptive practice or materially misrepresented a fact upon which defendants relied in entering the franchise agreement.

---

[3] Yurick never provided evidence in derogation of the pro forma's projected labor costs or its factual premises.

Putting aside damages, defendants Yurick and Albert argue that Shaw duped them into signing the franchise agreement and its attached "Guarantee" as individuals, thereby defrauding them out of the insulation from liability that they expected to enjoy through Hartland, LLC. The record demonstrates, however, that the individual defendants knew that they were signing a franchise agreement in their individual capacities. Yurick testified in his deposition that Shaw presented the documents and stated "I need you to get these—some signatures on this and this is just the franchise and license agreement. He says [sic] we all need to be on it, and I said well, I'll sign it, but . . . I need to have time to review this, and so I signed and I was expecting to get a copy that day . . . ." Although Yurick did not get a copy back to review for another five months, defendants did not raise the issue of the insulation from liability until several months into the case. Moreover, defendants only suggest that it was the *understanding* of the partners that Hartland, LLC would accept sole responsibility as the franchisee,[4] and the documents do not refer to Hartland, LLC at all. The documents containing defendants' signatures as individuals and guarantors clearly indicate a direct legal relationship with plaintiff. Therefore, defendants failed to support their claim that, through an untrue material representation or deceptive practice, they were defrauded into believing that the franchise agreement only covered Hartland, LLC.

Defendants argue for the first time on appeal that plaintiff is vicariously liable for Shaw's individual breaches of his fiduciary duty (as opposed to his fraudulent misrepresentations), and that plaintiff breached the contract by providing substandard goods and support. "We need not review issues raised for the first time on appeal although we may do so to prevent manifest injustice." *Herald Co v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998). Because defendants have provided little or no legal and factual support for their claims, we do not review them.

Finally, defendants unnecessarily prolonged litigation and increased costs by their fruitless efforts to root out a corporate-wide scheme to defraud franchisees. Therefore, the trial court did not abuse its discretion when it rejected defendants' argument that case evaluation sanctions would contravene the interests of justice. MCR 2.403(O)(11).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Christopher M. Murray

---

[4] It is notable that this rendition of the facts contradicts other assertions of defendants, namely that plaintiff should have charged defendants a reduced franchise fee because of Shaw's status as franchisee.